91-1391

(1)

Supreme Court, U.S.
FILED
MAR 19 1992
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

RAY PATTON Petitioner,

against

STATE OF OHIO Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE LUCAS COUNTY, OHIO COURT OF APPEALS

John G. Rust
4628 Lewis Avenue
Toledo, Ohio 43612
(419) 476-0347

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of Petitioner's due process rights as well as rights under the Sixth Amendment to the United States Constitution for a jury commission to excuse prospective jurors for a prospective panel of jurors for a Petitioner's criminal case, where such excuses are granted outside the constraints and parameters of Ohio Revised Code § 2313.12, et al.,and where Petitioner's counsel has not acceded to such requests, and wherein said excused jurors could potentially form part of a prospective panel in Petitioner's case?

2. Is it in compliance with the Fifth Amendment and other provisions of the United States Constitution for a defendant to be convicted on both rape charge as well as attempted rape charge in circumstances wherein the victim has been sexually assaulted in the form of consummated sexual intercourse in conjunction with sexual acts leading to sexual intercourse under circumstances

wherein the acts occur within one room over a time space of approximately one hour, and wherein the assailant's acts leading to consummated sexual intercourse are aborted acts of a similar sexual nature, but not consummated?

3. Is it a denial of Petitioner's rights under the United States Constitution to convict him of rape and attempted rape under the Ohio Revised Code Section 2907.02 where the only physical evidence linking Petitioner to the rape is the alleged Petitioner's fingerprint on a mirror located in the same room as where the rape occurred, coupled with evidence that the assailant touched the mirror at or near the time of the incident, along with Petitioner's skin color matching the identification by the victim of the alleged Petitioner's skin color?

4. Is it a denial of Petitioner's due process rights for a court to refuse to grant access or admit victim's statement in evidence (to the Complainant's statement) made to the Police De-

partment about the alleged criminal violations herein, said statement being requested by Petitioner at the close of the direct testimony of Complainant pursuant to Criminal Rule 16(B)(6) where there are inconsistencies in the victim's versions?

5. Is it a denial of Petitioner's due process rights (pursuant to Ohio Revised Code Section 2945.25(A) and other relevant constitutional provisions) to convict and sentence separately a Petitioner of separate counts of rape under Ohio Revised Code Section 2906.02 under the circumstances wherein the assailant (purported to be Petitioner) has vagainal intercourse with the victim, withdraws before culmination, and resumes vaginal intercourse with the victim after a period of a few minutes (all within the same location?

6. Is Petitioner entitled to a reasonable delay between the completion of trial in a felony criminal case and sentencing in order to confer with counsel and said sentencing should not be

conducted without the benefit of victim impact statement under Ohio Revised Code Section 2945. 051?

7. Is it prejudicial error, in a felony rape trial to refuse to exclude, upon Petitioner's motion in limine, fingerprints of Petitioner, in circumstances wherein such fingerprints of Petitioner, presented as known prints, are extracted and utilized without a probable cause basis pursuant to constitutional standards?

CONCLUSION

By reason of the foregoing, Petitioner's constitutional rights to a fair trial have been denied.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
PRAYER	
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT OF CERTIORARI	
I. IT IS A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS AS WELL AS RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR A JURY COMMISSION TO EXCUSE PROSPECTIVE JURORS FOR A PROSPECTIVE PANEL OF JURORS FOR A PETITIONER'S CRIMINAL CASE, WHERE SUCH EXCUSES ARE GRANTED OUTSIDE THE CONSTRAINTS AND PARAMETERS OF OHIO REVISED CODE § 2313.12, et al., AND WHERE PETITIONS'S COUNSEL HAS NOT ACCEDED TO SUCH REQUESTS, AND WHEREIN SAID JURORS COULD POTENTIALLY FORM PART OF A PROSPECTIVE PANEL IN PETITIONER'S CASE.	7
II. A DEFENDANT SHOULD NOT BE CONVICTED OF BOTH RAPE CHARGE AS WELL AS ATTEMPED RAPE CHARGE IN CIRCUMSTANCES WHEREIN THE VICTIM HAS BEEN SEXUALLY ASSAULTED IN THE FORM OF CONSUMMATED SEXUAL INTERCOURSE IN CONJUNCTION WITH SEXUAL ACTS LEADING TO SEXUAL INTERCOURSE UNDER CIRCUMSTANCES WHEREIN THE ACTS OCCUR WITHIN ONE ROOM OVER A TIME SPACE OF APPROXIMATELY ONE HOUR, AND WHEREIN THE ASSAILANT'S ACTS LEADING TO CONSUMMATED SEXUAL INTERCOURSE ARE ABORTED ACTS OF A SIMILAR SEXUAL NATURE, BUT NOT CONSUMMATED.	14

Page

III. IT IS A DENIAL OF PETITIONER'S RIGHTS UNDER THE UNITED STATES CONSTITUTION TO CONVICT HIM OF RAPE UNDER THE OHIO REVISED CODE SECTION 2907.02 WHERE THE ONLY PHYSICAL EVIDENCE LINKING PETITIONER TO THE RAPE IS THE ALLEGED PETITIONER'S FINGERPRINT ON A MIRROR LOCATED IN THE SAME ROOM AND WHERE THE RAPE OCCURRED COUPLED WITH EVIDENCE THAT THE ASSAILANT TOUCHED THE MIRROR AT OR NEAR THE TIME OF THE INCIDENT, ALONG WITH PETITIONER'S SKIN COLOR MATCHING THE IDENTIFICATION BY THE VICTIM OF THE ALLEGED PETITIONER'S SKIN COLOR. 19

IV. IT IS A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS FOR A COURT TO REFUSE TO GRANT ACCESS OR ADMIT VICTIM'S STATEMENT IN EVIDENCE (TO THE COMPLAINANT'S STATEMENT) MADE TO THE POLICE DEPARTMENT ABOUT THE ALLEGED CRIMINAL VIOLATIONS HEREIN, SAID STATEMENT BEING REQUESTED BY PETITIONER AT THE CLOSE OF THE DIRECT TESTIMONY OF COMPLAINANT PURSUANT TO CRIMINAL RULE 16(B)(6) WHERE THERE ARE INCONSISTENCIES IN THE VICTIM'S VERSIONS. 26

V. IT IS A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS (PURSUANT TO OHIO REVISED CODE SECTION 2945.25(A) TO CONVICT AND SENTENCE SEPARATELY A PETITIONER OF SEPARATE COUNTS OF RAPE UNDER OHIO REVISED CODE SECTION 2906.02 UNDER THE CIRCUMSTANCES WHEREIN THE ASSAILANT (PURPORTED TO BE PETITIONER) HAS VAGINAL INTERCOURSE WITH THE VICTIM, WITHDRAWS BEFORE

Page

CULMINATION, AND RESUMES VAGINAL INTERCOURSE WITH THE VICTIM AFTER A PERIOD OF A FEW MINUTES (ALL WITHIN THE SAME LOCATION). 30

VI. PETITIONER IS ENTITLED TO A REASONABLE DELAY BETWEEN THE COMPLETION OF TRIAL IN A FELONY CRIMINAL CASE AND SENTENCING IN ORDER TO CONFER WITH COUNSEL AND SAID SENTENCING SHOULD NOT BE CONDUCTED WITHOUT THE BENEFIT OF VICTIM IMPACT STATEMENT UNDER OHIO REVISED CODE SECTION 2945.051. 34

VII. IT IS PREJUDICIAL ERROR, IN A FELONY RAPE TRIAL TO REFUSE TO EXCLUDE, UPON PETITIONER'S MOTION IN LIMINE, FINGERPRINTS OF PETITIONER, IN CIRCUMSTANCES WHEREIN SUCH FINGERPRINTS OF PETITIONER, PRESENTED AS KNOWN PRINTS, ARE EXTRACTED AND UTILIZED WITHOUT A PROBABLE CAUSE BASIS PURSUANT TO CONSTITUTIONAL STANDARDS. 36

CERTIFICATE OF SERVICE 39

TABLE OF AUTHORITIES

Table of Cases: Page

Fay v. New York; 332 U.S. 261; 91 L.Ed, 2024; 67 S. Ct. 1613, reh denied 332 U.S. 784 13

Hoyt v. Florida; 368 U.S. 57, 7 L.Ed 2d 118, 82 S. Ct. 159 13

Jackson v. Virginia; 332 U.S. 307 (1979) . . . 22,23

Mapp v. Ohio; 367 U.S. 643; 81 S. Ct. 1684 . . 37

Smith v. Texas; 311 U.S. 128; 85 L.Ed 84; 61 S. Ct. 1684 13

Stanford V. Relly; 541 NE2 124; 44 O. App. 2d 30 (1989) 27

State v. Abi-Sarks; 41 O. App. 2d, 333 535 N.E. 2d 745 32

State v. Brown; 7 O. App. 3d 113 at 116-117 (1982) 15

State v. Davis; 60 O. App. 2d 355 12

State v. Donald; 57 O. St. 2d 73; (1979) . . . 14

State v. Earich; 4 O. App. 3d 183; 447 N.E. 2d 121 33

State v. Ebright; 11 O. App. 3d 97 (1983) . . 21

State v. Franks; 61 O. App. 2d 51 (1979) . . . 20

State v. Graven; 54 O. St. 2d, 114 at 118 (1978) 21

State v. Griffin; 13 O. App. 3d 376 at 377 (1979) 21

Page

State v. Kent; 68 O. App. 2d 151; 429 N.E. 2d; 453 32

State v. Kulig; 37 O. St. 2d 157 at 160 (1974) 20,21

State ex rel National Broadcasting Co. v. Cleveland; 38 Ohio App. 3d 79; 526 NE2d 789 Cuyahoga County Court of Appeals . . 28

State v. Roe; 41 O.S. 3d 18, 525; N.E. 2d, 1351 (1989) 12

State v. Sorqee; 564 O. St. 2d 464 (1978 . 20

State v. Ware; 63 O.S. 2d 84 15,32

State v. White; 15 O.S. 2d 146; (1968) . . 27

In Re Winship; 397 U.S. 358; (1967) . . . 22

Table of Authorities:

Ohio Revised Code § 2907.02 Aggravated Rape 1

Ohio Revised Code § 2923.02 Attempted Rape 1

Ohio Revised Code § 2811.13 Breaking and Entering 1

Ohio Revised Code § 2313.12, et al. . . . 7

Ohio Revised Code § 2313.16 7,8,9,

Ohio Revised Code § 2313.07 11

Ohio Revised Code § 2313.17 12

Page

Ohio Revised Code § 2941.25 (A) 14,15

Ohio Revised Code § 2907.02 19

Ohio Revised Code § 2901.05(A) 22

Criminal Rule 16(B)(6) 26

Ohio Revised Code § 2941.25(B) 30

Ohio Revised Code § 2945.051 34

Ohio Revised Code § 2947.06 34

Ohio Revised Code § 2947.051 34

In The

SUPREME COURT OF THE UNITED STATES

October, 1990 Term

RAY PATTON

Petitioner,

vs.

STATE OF OHIO,

Respondent

On Petition For A Writ Of Certiorari To The
Ohio Supreme Court

PRAYER

JURISDICTIONAL BASIS FOR RELIEF
CITATION OF REPORTED CASES

Petitioner prays that the Writ of Certiorari be granted herein for the reasons stated below. Jurisdiction of this matter is advanced pursuant to 28 U.S.C. 1257. All decisions below are unreported and are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner (Defendant) was charged with Aggravated Rape (Ohio Revised Code Section 2907.02), Attempted Rape (Ohio Revised Code Section 2923.02), and Breaking and Entering (Ohio Revised Code Section 2911.13) for a purported rape that occurred in Toledo, Ohio on September 9, 1988 in a residential dwelling (which dwelling was immediately adjacent to Petitioner's mother's home). Petitioner entered a not guilty plea at the trail court level and the matter, after numerous pretrial motions, was tried before a jury on January 20, 1989 in the Lucas County Common Pleas Court.

At the trial of the subject case, the following evidence was adduced in the prosecution's case-in-chief against Petitioner. First, the Complainant-Victim testified that a man entered her home (and subsequently forced intercourse, both vaginal and anal, on her) without her permission in the early morning of the date in question. She testified that her face was covered

by her assailant upon his initial encounter with her, such that she was not able to identify the assailant. This Complainant was not able to see the intruder, except for a glimpse of his skin on his arm, which she testified as being black. Complainant described her assailant as being between 5-8 to 5-10 in height, and not having a beard (but rather a day or two of beard growth), having allegedly detected this when she was kissed by the intruder. The only other feature testified to by the victim of the alleged assailant was that he had a rather low voice. Complainant was not able to otherwise identify the perpetrator and could not identify the Petitioner as her attacker. The victim also stated that the perpetrator had taken credit cards, cash, and a bottle of whiskey when he left the premises, and further stated that the assailant touched a mirror in the living room when he was about to leave the premises.

A medical record custodian witness testified that the Complainant appeard at the hospital

shortly after the attack, and introdued evidence of the medical records that were made when the victim went to the hospital shortly after the attack. The only evidence contained, or presented, as reflected in the medical records was the presence of semen that was not tied in to Petitioner (or any person as no DNA testing was consummated). In fact, none of the components of the rape kit were tied to Petitioner.

The victim's brother testified that after the event, during darkened morning hours (several hours after the incident), he saw a man that appeared to be the Petitioner, enter the house adjacent to that of the victim with an object tucked under his shirt. The adjacent house was that of Petitioner's mother.

Additionally testifying for the State was Officer Marok of the Toledo Police Department, who testified, over Petitioner's objection, that two latent fingerprints were lifted from the mirror, and that they purported to match Petitioner's

known fingerprints. Extensive cross-examination by Petitioner's counsel centered on the noticeable difference between the latent prints and the known prints of Petitioner, plus the poor quality of the latent prints (among other facts). The foregoing was the main thrust of the State's case-in-chief.

On the other hand, Petitioner's evidence comprised, in general, the following. First, Petitioner testified that he did not commit the act and that he was not staying at his mother's house at the time. Petitioner, who wore a fairly full beard, stated he had the same beard length before the date of the alleged incident. This aspect (of Petitioner's prior full beard length) was corroborated by various witnesses for Petitioner at trial.

Moreover, Petitioner testified he was 6-2 in height and this was not refuted at trial (this testimony was elicited by reason of the fact that the Complainant indicated at trial that her assail-

ant was 5-8 to 5-10 in height). Other witnesses testified that the Petitioner had a full beard (i.e., basically the same beard length that Petitioner had at trial) and that his beard length was about the same length at the time or around September, 1988.

Petitioner's expert on fingerprinting, Mr. A. J. Szgeti, testified that the latent fingerprints were not those of Petitioner, after making a comparison between the known prints and the latent fingerprints, stating that there were noticeable differences between the two sets.

Moreover, Petitioner's sister testified that she had, as a matter of practice for several months, drove him in her car from the place where he lived (some several miles from the location of the alleged incident herein) to transport him to work. She testified, as was her usual practice, that she picked up Petitioner on the day of the incident, about mid-day, at where Petitioner was living, at this same distal location and trans-

ported him to work.

The Prosecution then had Officer Keifer testify (subsequent to Petitioner's objection) on rebuttal mainly concerning his alleged opinion on the similarity between the latent and known prints, in addition to other rebuttal testimony.

After several hours of deliberation, the jury returned a verdict of guilty as to all counts of the indictment, and Petitioner was sentenced immediately by the Court (over Petitioner's objections).

Prior to the trial in this matter, Petitioner filed several pretrial motions, some of which were the subject of evidentiary hearings.

Petitioner filed an appeal to the Lucas County Court of Appeals, which Court affirmed the trial court (See Appendix A). An appeal was then taken to the Ohio Supreme Court, and this appeal right was denied (See Appendix B).

REASONS FOR GRANTING THE WRIT

I.

IT IS A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS AS WELL AS RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR A JURY COMMISSION TO EXCUSE PROSPECTIVE JURORS FOR A PROSPECTIVE PANEL OF JURORS FOR A PETITIONER'S CRIMINAL CASE, WHERE SUCH EXCUSES ARE GRANTED OUTSIDE THE CONSTRAINTS AND PARAMETERS OF OHIO REVISED CODE § 2313.12, ET AL., AND WHERE PETITIONER'S COUNSEL HAS NOT ACCEDED TO SUCH REQUESTS, AND WHEREIN SAID EXCUSED JURORS COULD POTENTIALLY FORM PART OF A PROSPECTIVE PANEL IN PETITIONER'S CASE.

At the beginning of the trial in this matter, Petitioner moved to set aside the jury array for the reason that the manner of selecting the jury array did not comport with the applicable requirements of the Ohio Revised Code. Specifically, Petitioner advanced such motion for the reason that there was not proper compliance with the requirements of Ohio Revised Code § 2313.12 and § 2313.16. These specific code sections provided as follows:

O.R.C. § 2313.12:

"If a prospective juror fails to

attend as specified in the notice referred to in section 2313.10 of the Revised Code, for any cause except physical disability, or if he refused to be sworn, or to answer any legal and pertinent question put to him by a commissioner of jurors, such fact shall be reported by the commissioner to the court and such person shall be dealt with as for contempt of court. One or more successive notices may be served upon the same person when he fails to attend as required by the former notice and he shall be liable to punishment as for contempt of court for each failure to attend. A commissioner may dispense with the perosnal appearance of a person so notified, when another person cognizant of the facts is produced and testifies in his stead. When a person has so attended twice for examination, he cannot be required to attend again in the same jury year."

O.R.C. § 2313.16:

"Except as provided in section 2313.13 of the Revised Code, the court of common pleas shall not excuse a person, liable to serve as a juror and drawn and notified, unless it is shown to the satisfaction of the judge by either the juror or another person acquainted with the facts, that:

(A) The juror is then necessarily absent from the county and will not return in time to serve;

(B) The interests of the public, or of the juror, will be materially injured by the juror's attendance;

(C) The juror is physically unable

> to serve;
>
> (D) The juror's spouse, or a near relative of the juror or the juror's spouse, has recently died or is dangerously ill;
>
> (E) The juror has been called as a juror for trial in a court of record in the county within the same jury year.
>
> When a person liable to serve is excused, in a case specified in this section, or when a person notified to attend a term as a juror is entitled to and claims an exemption, the juror can be excused only by the judge presiding or a representative of the judge. Such an excuse shall not extend beyond that term. Every approved excuse shall be recorded and filed with the jury commissioners."

The above sections provide the means by which jurors should be excused from jury service (i.e. from being on the basic panel). Under Ohio Revised Code § 2313.16, as stated above, no juror shall be excused from service unless certain requirements are complied with, namely, that the reasons for the excuse fall within one of the designated categories set forth in this latter section of the code.

In this situation, it was testified to by Mrs. Ritter, the acting jury commissioner clerk of the Lucas County Common Pleas Court, from the jury poll

of 150 (from which Petitioner's jury was drawn herein) that one student's mother had called before the trial and asked that her daughter be excused and was excused. Also, Charlotte Martinez, the jury clerk testified that a minimum of 20 jurors out of 100 called as to this basic panel, were excused over the telephone. It was further testified to that of these 20 that were so excused, this represented at least 20% of the jurors that were excused (not in open court). It was indicated that there were some automatically excused for being over 70 years of age. Yet O.R.C. § 2313.16 does not provide for such an excuse right (i.e. for being over 70 years old). Mrs. Ritter stated that as many as 35% are excused by telephone calls. Mrs. Ritter also indicated that many of these people were excused for such things as attending law school classes, having young children under the age of 6, etc.

The prejudice involved in this situation is that the Petitioner's right to a fair and impar-

tial jury trial as mandated by the Sixth Amendment to the United States Constitution is seriously inpaired, since the selection process is no longer random (as required by O.R.C. § 2313.07), but is rather a matter of the arbitrary and independent judgment of a person in the jury commissioner's office, and without complying with O.R.C. § 2313.16. There is no record of the race, background or other facts of the people who are so excused such that Petitioner can determine the viability of such an excuse. In short, Petitioner cannot and did not have the ability to participate in this process.

Furthermore, notwithstanding the constitutional question, there is the existence of a statutory requirement for the selection of jurors. It behooves the State to adhere to the law just as much as the Petitioner or other citizens who are brought to task for allegedly violating the law. This aspect of similar burdens has been recognized by certain Ohio courts. See, for ex-

ample, State v. Davis; 60 O. App. 2d 355 - in which it was held that an indictment was void where prospective jurors were excused in a manner not in conformance with the parameters of Ohio Revised Code § 2313.17.

The question of racial composition of a petit jury was addressed in State v. Roe (41 O.S. 3d 18, 535, N.E. 2d, 1351; 1989) with the holding that a petit jury need not reflect the racial or other composition of a community, however, it is the position of Petitioner that the challenged procedure detracts from Petitioner's ability to help participate in the jury selection process. A defect in the selection process taints the procedure and is clearly unconstitutional under the Sixth Amendment of the United States Constitution. The United States Supreme Court had addressed this issue and has held that the traditional appropriation in this county contemplates a jury drawn from a cross section of the community, and that the right to an impartial jury necessarily

encompasses a selection process without systematic exclusion of any group of persons. (See, for example, Fay v. New York; 332 U.S. 261; 91 L.Ed. 2024; 67 S. Ct. 1613, reh denied 332 U.S. 784). (See also Hoyt v. Florida; 368 U.S. 57, 7 L.Ed 2d 118, 82 S. Ct. 159). The Supreme Court has stated that the mode of the jury selection process must be examined in order to determine whether there is some rational basis for exclusions. (See Smith v. Texas; 311 U.S. 128; 85 L.Ed 84; 61 S. Ct. 1684)

II

A DEFENDANT SHOULD NOT BE CONVICTED ON BOTH RAPE CHARGE AS WELL AS ATTEMPTED RAPE CHARGE IN CIRCUMSTANCES WHEREIN THE VICTIM HAS BEEN SEXUALLY ASSAULTED IN THE FORM OF CONSUMMATED SEXUAL INTERCOURSE IN CONJUNCTION WITH SEXUAL ACTS LEADING TO SEXUAL INTERCOURSE UNDER CIRCUMSTANCES WHEREIN THE ACTS OCCUR WITHIN ONE ROOM OVER A TIME SPACE OF APPROXIMATELY ONE HOUR, AND WHEREIN THE ASSAILANT'S ACTS LEADING TO CONSUMMATED SEXUAL INTERCOURSE ARE ABORTED ACTS OF A SIMILAR SEXUAL NATURE, BUT NOT CONSUMMATED.

As a point of departure, Ohio Revised Code § 2941.25(A) provides as follows:

> "(A) Where the same conduct by Defendant can be construed to constitute two or or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

In this respect, as can be seen, the foregoing section is structured to prevent multiple convictions arising from a relatively singular incident, even though charged as separate counts. The instant case involves a situation closely analogous to that presented in State v. Donald; 57 O. St. 2d 73; 1979. In that case, the defendant had forced

a woman from one room into another where the defendant raped her. The Ohio Supreme Court held that since the Defendant had acted with but single animus, the kidnapping was incidental to the rape, and the two offenses were accordingly "merged" by operation of Ohio Revised Code § 2941.25(A), and the defendant could only be convicted for one of them, pursuant to that statute, even though charged with mutiple offenses. In connection with this latter provision of the Code, while the jury may be required to determine the guilt or innocence with respect to each count where separate offenses alleged are of similar import, an accused may be convicted of only one of those offenses, so long as the evidence discloses that the accused commited said offenses concurrently, with but a single animus. (See e.g. State v. Brown; 7 O App. 3d 113 at 116-117; 1982) (See also State v Ware; 63 O.S. 2d 84).

In this latter light, the Ohio Supreme Court ruled in State v. Price, 60 O.S. 2d 136, that a

rape conviction and a kidnapping conviction are allied offenses of similar import within the context of Ohio Revised Code § 2941.25 and cannot be punished by a plurality of sentences in circumstances where they are not connected separately and not with a separate animus.

The only testimony in this case that is really relevant to this issue is that of the victim. The victim testified that the assailant ordered her to go downstairs, and that when they were downstairs, the assailant attempted to have anal sex with her, and then subsequently the assailant had vaginal sex with her, and thereafter the assailant withdrew his penis from the victim, apparently without culmination of the act, and thereafter the assailant again re-entered the victim's vagina. The only apparent interruption was when the assailant obtained some whiskey and pured it on the victim's breasts. All these events, as the evidence was adduced, appeared to have occurred over a period of less than one hour

in a single room.

It thus appears clear from this testimony that the assailant had acted with singular animus and that in reality only one act of rape occurred, by whomever perpetrated it, and that the offenses all are of similar import. Equally important is the fact that they all occurred within a relatively short time frame, within a single room, and the victim was situated in one location of the room where it occurred, without being moved. The victim indicated that there was an attempt at anal intercourse that was immediately aborted at her request, with brief vaginal intercourse (where the assailant apparenlty did not culminate the act but withdrew prior to such culminaiton), and then the assailant re-entered the victim's vagina within a matter of a few minutes and culminated the act.

The thrust of Petitioner's argument herein is viewed from yet another perspective, that of the double jeopardy clause of the Fifth Amendment to

the United States Constitution. In this respect, the double jeopardy clause applies irrespective of whether the charges and convictions result from a singular trial. Moreover, the double jeopardy clause proscribes successive prosectuion and cumulative punishment for a greater and lesser included offense. (See Brown v. Ohio; 53 L. Ed 2d, 187; 97 S. Ct. 2221).

III

IT IS A DENIAL OF PETITIONER'S RIGHTS UNDER THE UNITED STATES CONSTITUTION TO CONVICT HIM OF RAPE AND ATTEMPTED RAPE UNDER THE OHIO REVISED CODE SECTION 2907.02 WHERE THE ONLY PHYSICAL EVIDENCE LINKING PETITIONER TO THE RAPE IS THE ALLEGED PETITIONER'S FINGERPRINT ON A MIRROR LOCATED IN THE SAME ROOM AS WHERE THE RAPE OCCURRED, COUPLED WITH EVIDENCE THAT THE ASSAILANT TOUCHED THE MIRROR AT OR NEAR THE TIME OF THE INCIDENT, ALONG WITH PETITIONER'S SKIN COLOR MATCHING THE IDENTIFICATION BY THE VICTIM OF THE ALLEGED PETITIONER'S SKIN COLOR.

Petitioner contends that there is insufficient evidence to sustain a verdict of guilty of each and every count of indictment herein. Specific analysis of the evidence in this respect reveals that the only evidence that was offered by the prosecution that purports to allegedly link Petitioner as the assailant was the fingerprint evidence (on the mirror in the room where the rape occurred) adduced by the prosecution over Petitioner's objection.

First, as a basic point of departure, O.R.C. § 2907.02 provides in relevant part as follows:

"....

> (2) No person shall engage in sexual contact with another when the offender purposely compels the other person to submit by force or threat of force."

This section requires proof of sexual conduct. When the offender "purposely compels another to submit by force", at issue in the trial of this case was the identity of the perpetrator and the further questions of whether there was sufficient proof of (1) purposely compelling the victim to submit, and (2) whether there was the requisite proof involved. Petitioner maintains that there was not sufficient proof in this regard, and the following general legal standards on the question of sufficiency of evidence, through constitutional perspectives and otherwise, support this position of Petitioner in this regard.

In Ohio, a conviction cannot be based upon circumstantial evidence, unless such circumstantial evidence is bound to be totally irreconciable with any rationale theory of innocence (State v. Kulig; 37 O. St. 2d 157 at 160; 1974) (State v. Sorgee; 564 O. St. 2d 464; 1978) (State v. Franks;

61 O. App. 2d 51; 1979) (State v. Ebright; 11 O. App. 3d 97; 1983). This latter aspect of law as found in State v. Kulig, supra, has been found to apply where the evidence relative a single element of the offense is circumstantial, and there exists a reasonable hypothesis of innocence which would tend to be or be likely to negate the existence of that particular element of the offense. (See State v. Griffin; 13 O. App. 3d 376 at 377; 1979).

In State v. Graven; 54 O. St. 2d, 114 at 118; 1978, the Ohio Supreme Court ruled on this question in the following terms:

> "....it is axiomatic that criminal conduct may be, and in many instances, can only be proved by circumstantial evidence. However, the circumstantial evidence relied upon to prove an essential element of the crime must be irreconcilable with any reasonable theory of innocence in order to support a finding of guilty." State v. Kulig; 37 O. St. 2d 157 (1974).
>
> Thus, where circumstantial evidence is relied upon to prove elements of the crime, as in the cause sub judice, the jury must find it to be of such conclusive and persuasize force that it excludes every reasonable hypothesis of innocence."

The inveterate requirement of proof beyond a reasonable doubt in a standard criminal case is codified in Ohio Revised Code § 2901.05(A) and is a constitutional component of due process made applicable to the states by operation of the Fourteenth Amendment to the United States Constitution (In Re Winship; 397 U.S. 358; 1967).

Further, in Jackson v. Virginia; 443 U.S.307; 1979, the United States Supreme Court ruled that in order to sustain a criminal conviction, due process requires that the evidence as to each element of an offense as defined by state law must be supported by evidence of sufficient quality and probative force to enable a rational trier of fact to conclude that proof beyond a reasonable doubt has been established. Where the evidence is such that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, a conviction cannot constitutionally be upheld.

In this particular case, the alleged fingerprint evidence was found on the mirror in the

house purportedly in the same room in which the alleged rape occurred. Aside from Petitioner being a black person (the victim described her assailant's skin as black) and having a low voice, there is absolutely nothing in the way of evidence to link Petitioner with the purported rape of the victim in this case. Under the Test of Jackson v. Virginia; 443 U.S. 307; 1979, as indicated above, the proof in this situation is not of a sufficient quality and probative value that a jury could decide the guilty verdict beyond a reasonable doubt. A single fingerprint (or possibly 2) is not sufficient proof that Petitioner had in fact committed the alleged rape (i.e. engaged in sexual conduct with the victim), nor does it prove that Petitioner acted "purposely" to compel the victim. This fingerprint evidence, or other evidence, was not on victim's person, nor was it on the victim's clothes. In fact, there was no evidence on the victim or the victim's clothing that would link Petitioner to the alleged sexual

or other contact with the victim. Further, there was no evidence of violence or physical harm inflicted upon the victim. The only evidence consists of the victim's testimony and the fingerprints.

Most significant in this latter respect is the fact that the victim went to the hospital immediately after the incident, and a "rape kit" was constructed. This rape kit, which eventually was entered into evidence as State Exhibit Number 1 contained absolutely not one iota of physical evidence that was linked to Petitioner. In fact, a semen sample was taken, yet even in the contemporaneous circumstances of present-day forensic science, where DNA testimony of semen can be used to generate genetic comparisons, the testimony revealed no such comparison testing was consummated in this matter, even though the opporutnity admittedly existed. Thus, there was no blood, semen, hair particles, clothing strands, or other physical evidence that connected Petitioner to the

incidents in question.

Under such circumstances, there was not sufficient proof linking Petitioner to the incidents in question in this matter. There is no proof, by the existence of these purported fingerprints that the Petitioner engaged in sexual conduct with the victim. The evidence is consistent with innocence. (See also Carella v. California; 109 S. Ct. 2419 (1989).

IV

IT IS A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS FOR A COURT TO REFUSE TO GRANT ACCESS OR ADMIT VICTIM'S STATEMENT IN EVIDENCE (TO THE COMPLAINANT'S STATEMENT) MADE TO THE POLICE DEPARTMENT ABOUT THE ALLEGED CRIMINAL VIOLATIONS HEREIN, SAID STATEMENT BEING REQUESTED BY PETITIONER AT THE CLOSE OF THE DIRECT TESTIMONY OF COMPLAINANT PURSUANT TO CRIMINAL RULE 16(B)(6) WHERE THERE ARE INCONSISTENCIES IN THE VICTIM'S VERSIONS.

At the conclusion of the direct examination of Complainant, Petitioner's counsel requested a copy of Complainant's pretrial statement in order to cross-examine the Complainant therein. This request was advanced pursuant to Criminal Rule 16(B)(6) on the basis that there were inconsistencies between the direct testimony of Complainant and such pretrial statement.

In this respect, Criminal Rule 16(B) provides in relevant part as follows:

> "(g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and

> participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement...."

It is clear that if such inconsistencies exist, it appears mandatory that Petitioner's counsel be given a copy of the statement for use in cross-examining the witness, and the entire statement must be given even if there is only one inconsistency in the statement. Moreover, if the statement is not given to the defendant, it must be preserved for purposes of appeal.

The Supreme Court of Ohio has declared that such statement must be provided under the Criminal Rule provision even if the inconsistencies are not established until the Petitioner's cross-examination process. (State v. White (15 O.S. 2d 146; 1968).

In this situation, the motion was made at the close of the prosecution's case and the motion was denied, yet counsel for Petitioner ascertained and pointed out areas of inconsistency, before and during cross-examination, as specifi-

cally delineated in the Trial Transcript. Defense counsel pointed out to the Court that there were apparent discrepancies between what the witness stated about how tall the assailant was and statements made by the victim that the assailant believed her to be living alone, and these apparent inconsistencies were stressed to the Court, yet the Court would not allow such statements to be given to Petitioner's counsel for cross-examination. (Moreover, after overruling such motion, the Court did not enter the document into evidence.)

In this respect, two Ohio Courts of Appeals have ruled most recently that prosecuting witness statements comprise public records under O.R.C. Section 149.43 (and presumably are available to defense counsel or other interested participants). (See Stanford v. Relly; 541 NE 2d 124; 44 O. App. 2d 30; 1989 Clark Cty.) (Also see State ex rel National Broadcasting Co. v. Cleveland; 38 Ohio App. 3d 79; 526 NE2d 789 Cuyahoga County Court of Appeals).

It is the position of the Petitioner that he should not only have been given an opportunity to cross-examine on the statement,but more importantly, have been given the right to have the statement placed in evidence. Petitioner urges that under the recent authority - trend of these two latter Court of Appeals cases, denial of the right of cross-examination and denial of admission thereof into evidence, seriously violates Appellant's rights under the Constitution, particularly the Sixth Amendment. Clearly, why should a prosecution witness' statement be treated more sacrosanctly than that of defense witnesses. There can be no disparity and thus must be remedied.

V

IT IS A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS (PURSUANT TO OHIO REVISED CODE SECTION 2945.25(A) TO CONVICT AND SENTENCE SEPARATELY A PETITIONER OF SEPARATE COUNTS OF RAPE UNDER OHIO REVISED CODE SECTION 2906.02 UNDER THE CIRCUMSTANCES WHEREIN THE ASSAILANT (PURPORTED TO BE PETITIONER) HAS VAGINAL INTERCOURSE WITH THE VCITIM, WITHDRAWS BEFORE CULMINATION, AND RESUMES VAGINAL INTERCOURSE WITH THE VICTIM AFTER A PERIOD OF A FEW MINUTES (ALL WITHIN THE SAME LOCATION).

Ohio Revised Code § 2941.25(A) provides as follows:

> "(A) Where the same conduct by Defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

Additionally, Ohio Revised Code § 1931.14(B) provides as follows:

> "Where the defendant's conduct constitutes two (2) or more offenses of dissimilar import, or where hie conduct results in two (2) or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

As can be seen, these latter sections clearly indicate that where the conduct of the perpetrator constitutes two or more offenses of .... of the same or similar kind committed with the same animus as to each, then the Petitioner cannot be convicted separately and sentenced separately. The key, in this respect, is the singular animus.

In this latter respect, there is evidence adduced to the effect that the perpetrator had vaginal intercourse with the victim for about five (5) minutes, thereafter withdrawing before culmination. A second vaginal penetration was then undertaken shortly after the first act of penetration (apparently without culmination) after the perpetrator apparently obtained a bottle of whiskey in the victim's home and drank some and then poured whiskey on the victim's chest, but this occurred within a time frame of a few minutes after the first act of vaginal penetration. Thereafter, the assailant had resumed vaginal intercourse with the victim and apparently culminated the act. All this occurred within a time period of apparently less

than one hour within the confines of a single room. From the onset of the first sexual assault committed by the assailant to the last act, the victim was in a singular location and was not moved about, nor was there evidence of any apparent motivation on the part of the assailant other than sexual gratification. The assailant did not culminate the act during the first vaginal penetration, but upon culminating the act after the second sexual penetration did so apparently culminate the act, and thereupon left from the victim's house. There was no evidence adduced as to a motivation, animus, or otherwise,aside from the apparent quest for sexual gratification. There was no such evidence of multiple animus.

In this light, attention is addressed to State v. Ware; 53 O. App. 2d, 210; 372 N.E. 2d 1367) - entries into two body cavities were considered separate rape offenses of a different kind. (See also State v Kent; 68 O. App 2d 151; 429 N.E. 2d, 453) See also State v. Abi-Sarks; 41 O. App. 2d,

333, 535 N.E. 2d 745). Additional references made to State v. Earich; 4 O. App 3d 183; 447 N. E. 2d 121 - a conviction of gross sexual imposition under O.R.C. § 2907.05(A)(1) and one attemped rape under 2923.02(A) are allied offenses of similar import and cannot be punished with multiple convictions or sentences.

VI

PETITIONER IS ENTITLED TO A REASONABLE DELAY BETWEEN THE COMPLETION OF TRIAL IN A FELONY CRIMINAL CASE AND SENTENCING IN ORDER TO CONFER WITH COUNSEL AND SAID SENTENCING SHOULD NOT BE CONDUCTED WITHOUT THE BENEFIT OF VICTIM IMPACT STATEMENT UNDER OHIO REVISED CODE SECTION 2945.051.

The last day of the trial of the subject case consumed a full day, and the jurors deliberated until approximately 9:00 P.M. Immediately after announcement of the verdict, the court indicated it would proceed to sentencing. Petitioner's counsel stated that he was not prepared on such short notice to enter into the sentencing stage. Notwithstanding this objection, the Court ordered the sentencing to proceed, and while there was opportunity to speak on behalf of the Petitioner, counsel was simply not prepared on this short notice to discuss sentencing aspects. More importantly, defense counsel was quite fatigued from a lengthy trial, coupled with a final day of trial extending to about 9:30 P.M. in the evening.

It is the contention of Petitioner that such

sentencing procedure should have been conducted at a time separated from the termination of the trial, and other than just immediately after the completion of the trial. As stated, Petitioner's attorney was completely exhausted after a three-day trial, with the final day being rather lengthy. It was not feasible for Petitioner's counsel to argue on Petitioner's behalf relative to the sentencing alternatives because of this state of fatigue (mental and physical) and this aspect coupled with the lack of adequate time to prepare (and talk to Defendant), thrust Petitioner into a prejudicial situation so that his due process rights under the United States Constitution were thereby seriously jeopardized.

In regard to the sentencing procedure, it is incumbent upon the Court to ask Petitioner whether he has anything to state (Ohio Revised Code § 2947.05) (Ohio Revised Code §2947.06) and to hear a victim impact statement (Ohio Revised Code § 2947.051).

VII

IT IS PREJUDICIAL ERROR, IN A FELONY RAPE TRIAL TO REFUSE TO EXCLUDE, UPON PETITIONER'S MOTION IN LIMINE, FINGERPRINTS OF PETITIONER, IN CIRCUMSTANCES WHEREIN SUCH FINGERPRINTS OF PETITIONER, PRESENTED AS KNOWN PRINTS, ARE EXTRACTED AND UTILIZED WITHOUT A PROBABLE CAUSE BASIS PURSUANT TO CONSTITUTIONAL STANDARDS.

At page 308 of the trial, Petitioner moved in limine to restrict the prosecution from introducing into evidence any fingerprint evidence of the Petitioner for the reason that such prints were used without a probable cause standard in violation of Petitioner's constitutional rights, as more fully discussed below.

Specifically, the inviolate privilege against self-incrimination does not generally apply to fingerprint extraction. However, if the accused (Petitioner) has been improperly detained, the fingerprint evidence (obtained during such illegal detention) may not be admissible under Fourth Amendment parameters. In this context of Petitioner's motion, Petitioner thus sought limitation in the introduction of fingerprint and other physical

evidence (as well as verbal statements) that were obtained as a result of the arrest and/or detention of Petitioner. (This motion in limine was similar in substance to the motion to suppress filed by Petitioner and is somewhat redundant.)

This evidence sought to be excluded would all be excludable if such evidence were in fact obtained and/or used without viable probable cause basis as delineated in Mapp v. Ohio; 367 U.S. 643; 81 S. Ct. 1684.

Here the Petitioner was arrested without probable cause or basis, and apparently without a proper warrant for his arrest, and while Petitioner's prints were not obtained as a result of his arrest in this incident, they were obtained and used without a proper foundation, therefore, as gauged by the probable cause standard of Mapp v. Ohio, cited above. In this regard, the basis of obtaining the prints arose from a relatively spurious and ambiguous identification of Petitioner. Petitioner was supposedly identified by the victim's brother the following morning as having

been a person he observed enter the house next to the victim's house. The brother indicated nothing in his identification about the person, including color, size, build, facial features, etc. In fact, the only thing the brother appeared to see was the person looking about furtively with a cylindrical object tucked under his shirt. He was allegedly identified as the man.

Other than the above, there was no basis for allegedly or purportedly connecting Petitioner to the matter and without a proper foundation. There was no probable cause to extract or use Petitioner's prints in this matter.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to Dean P. Mandross, Prosecutor's Office, Common Pleas Court of Lucas County, Court House, Toledo, Ohio 43624 this 22 day of January, 1992.

John G. Rust
Counsel for Petitioner

91-1391 (2)

Supreme Court, U.S.
FILED
MAR 19 1992
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

RAY PATTON Petitioner,

against

STATE OF OHIO Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE LUCAS COUNTY, OHIO COURT OF APPEALS

John G. Rust
4628 Lewis Avenue
Toledo, Ohio 43612
(419) 476-0347

Counsel for Petitioner

TABLE OF CONTENTS

	Page
NOTICE OF APPEAL TO FILE TO LUCAS COUNTY COURT OF APPEALS	1A
DECISION AND JUDGMENT OF LCUAS COUNTY COURT OF APPEALS	1B
ASSIGNMENTS OF ERROR FILED IN LUCAS COUNTY COURT OF APPEALS	36
OHIO REVISED CODE	
§ 2941.25	39
§ 2313.16	40
§ 2923.02	42
§ 2907.02	45
§ 2313.12	47
§ 2313.17	48
§ 2911.12	49
[§ 2947.05.1] §2947.051	50
ORDER OF OHIO SUPREME COURT OF DECEMBER 19, 1990 DENYING REVIEW OF LUCAS COUNTY COURT OF APPEALS ORDER	52
CERTIFICATE OF SERVICE	53

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

STATE OF OHIO	*	Case No. CR88-6776
-vs-	*	JUDGE DONEGHY
RAY PATTON	*	AMENDED NOTICE OF APPEAL
Defendant (Appellant)	*	

George R. Royer (0031392)
* Attorney for Defendant (Appellant)
* 421 N. Michigan, Suite C
Toledo, Ohio 43624
* (419) 241-6612

Now comes the Defendant (Appellant) in the subject case and appeals (and otherwise gives notice of his appeal) to the Lucas County Court of Appeals from the Judgment and Decision of the Lucas County Common Pleas Court dated January 25, 1989 (and as docketed on February 3, 1989) whereby Defendant (Appellant) was found guilty of two counts of rape (ORC 2907.02), one count of attempted rape (ORC 2907.02) and one count of aggravated breaking and entering (ORC 2911.11) and sentenced accordingly on January 25, 1989 to the Ohio Department of Corrections.

George R. Royer
Attorney for Defendant
(Appellant)

IN THE COURT OF APPEALS OF LUCAS COUNTY

State of Ohio — Court of Appeals No. L-89-041

Appellee — Trial Court No. CR 88-6776

v.

DECISION AND JOURNAL ENTRY

Ray Patton

Decided: July 27, 1990

Appellant

* * * * * *

Anthony J. Pizza, prosecuting attorney and Dean P. Mandross, for appellee.

George R. Royer, for appellant.

* * * * * *

This case is on appeal from a judgment of the Lucas County Court of Common Pleas. On January 25, 1989, appellant-defendant, Ray Patton, was sentenced for a period of ten to twenty-five years each on two counts of aggravated rape in violation of R.C. 2907.02, ten to twenty-five years on one count of attemped rape in violation of R.C. 2923.02, and eight to fifteen years on one count of aggravated burglary in violation of R.C. 2911.13. All sentences were ordered to be served consecutively.

The facts as established at trial are as follows:

On September 9, 1988, a man entered the bedroom

of Lori Ambramczyk, placed a pillow over her face and demanded money. As the assailant led the victim into her living room, the victim observed the assailant touch and flip over a free standing mirror that the victim had previously cleaned that evening. After the victim gave the assailant $50.00 and her bank card, he attempted to forcibly perform anal intercourse with her. The assailant then forcibly engaged in vaginal intercourse with the victim. There then followed a period of time during which the assailant drank whiskey and requested the victim perform fellatio. The victim, who still had the pillow against her face, told her assailant that if she complied she would be able to see his face. The assailant then forced a second act of vaginal intercourse.

The victim was prevented from seeing her assailant during the incident because of the pillow upon her face; however, she did manage to get a glimpse of the skin on her assailant's arm, which she testified was black. The victim further described her assailant as being 5'8" to 5'10" in height, and

not having a full beard but not clean shaven either. The only other feature the victim testifed to was that her assailant had a low pitched voice.

The victim further testified that after her assailant raped her, he left her home with cash, a bank card, a VCR, a television and a bottle of whiskey, all belonging to the victim.

Officers Edward Marok and Keith Snyder of the Toledo Police Department then testified the two latent fingerprints lifted from the victim's mirror matched known fingerprints of the defendant taken from a previous arrest.

The defendant testified that he was not the assailant and that he was never in the victim's house on or before the date the crimes took place. The defendant further produced an expert witness to disqualify the similarities between the fingerprints known to belong to the defendant and those fingerprints removed from the victim's mirror.

The victim's brother, Richard Baker, also

testified at the trial. He was called to and arrived at his sister's home shortly after the assailand fled. Baker testified that he remained with the victim's two children as she and her husband went to the h;ospital. He further testified that shortly before dawn he heard a car door slam and went to look from the window of his sister's home. He noticed the defendant in the street standing by a car acting in a nervous manner. Baker saw the defendant enter the house next door to his sister's which was later determine to be the house of defendant's mother.

It is from the January 25, 1989 sentencing that the defendant raises the following twenty-four assignments of error:

"1. IT WAS ERROR TO CONVICT DEFENDANT AS TO BOTH RAPE CHARGES IN THE SUBJECT CASE AS WELL AS THE ATTEMPTED RAPE (CHARGE) (OR THAT THE TRIAL COURT WAS REQUIRED TO HAVE THE PROSECUTION ELECT AS TO WHICH COUNTS SHOULD HAVBE [sic] BEEN SUMITTED [sic] TO THE JURY.

"2. THE COURT ERRED IN REFUSING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE AND REWNEWED [sic] AT THE END OF THE DEFENSE CASE (AS TO ALL COUNTS OF THE INDICTMENT.

"3. THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION TO SET ASIDE THE JURY ARRAY

ADVANCED AT THE COMMENCEMENT OF TRIAL AND BEFORE EMPANELING OF THE JURY. (ALTERNATELY, THE APPLICABLE JURY PANEL SELECTION PROCESS IS UNLAWFUL AND UNCONSTITUTIONAL.)

"4. THE COURT ERRED IN NOT GRANTING MORE TIME TO DEFENDANT TO PREPARE FOR SENTENCING AFTER COMPLETION OF THE TRIAL, AND NOT COMPLY WITH THE REQUIREMENT OF ORC SECTION 2947.05, ET AL.

"5. THERE WAS INSUFFICIENT EVIDENCE BEFORE THE COURT TO SUSTAIN THE CONVICTION OF THE APPELLANT AS TO THE CONVICTION FOR RAPE 2907.02 AND ATTMPTED RAPE. (UNDER OHIO REVISED CODE SECTION 2923.02).

"6. THE COURT ERRED IN REFUSING TO GRANT ACCESS TO THE COMPLAINANT'S STATEMENT MADE TO THE TOLEDO POLICE DEPARTMENT ABOUT THE ALLEGED CRIMINAL VIOLATIONS HEREIN, SAID STATEMENT BEING REQUESTED BY DEFENDANT (APPELANT) AT THE CLOSE OF THE DIRECT TESTIMONY OF COMPLAINANT PURSUANT TO CRIMINAL RULE 16(B)(6). (IT CONSTITUTED FURTHER ERROR NOT TO ADMIT SUCH STATEMENT INTO EVIDENCE.)

"7. THE COURT ERRED IN PERMITTING TOLEDO POLICE OFFICER EDWARD MAROK, TO TESTIFY AS AN EXPERT WITNESS ON FINGERPRINTING AND TESTIFY HEREIN AS TO SUCH MATTERS IN THIS CASE AND THEREBY RENDER AN OPINION AS TO THE LATENT PRINTS BEING THOSE OF DEFENDANT.

"8. IT CONSTITUTED ERROR TO PERMIT WITNESS SNYDER TO TESTIFY TO OPINION MATTERS (AS SET FORTH AT TRANSCRIPT PP 627-635).

"9. THE COURT ERRED IN PERMITTING WITNESS BAKER (THE BROTHER OF THE ALLEGED VICTIM) TO MAKE AN IN-COURT IDENTIFICATION OF THE DEFENDANT, AS BEING SUGGESTIVE.

"10. THE COURT ERRED IN OVERRULING DEFENDANT'S (APPELLANT'S) MOTION THAT THE VOIR DIRE OF DEFENDANT'S FINGERPRINT EXPERT (MR. SZGETI) TAKE PLACE OUTSIDE THE PRESENCE OF THE JURY.

"11. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A RIGHT TO INSPECT THE GRAND JURY MINUTES [sic] APPLICABLE TO DEFENDANT'S (APPLICANT'S CASE AND SUCH DENIAL CONSTITUTES AN INFRINGEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHT UNDER THE UNITED STATES CONSTITUTION.

"12. THE COURT ERRED IN REFUSING TO SEPARATE FOR TRIAL THE CHARGES OF BURGLARY (2911.12) FROM THE RAPE CHARGES (ORC SECTION 2907.02 AND ORC SECTION 2923.06).

"13. THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE (AS TO THE FINDING BY THE JURY THAT DEFENDANT WAS GUILTY AS TO ALL COUNTS OF THE INDICTMENT).

"14. THE COURT ERRED IN ADMITTING INTO EVIDENCE PROSECUTION EXHIBIT NUMBER 1-4 (MEDICAL RECORD OF COMPLAINANT) (RAPE KIT).

"15. THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL AFTER STATEMENTS WERE MADE THAT THE PROSECUTION WAS TALKING TO JURORS.

"16. THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT'S COUNSEL TO ASK THE FOLLOWING QUESTION OF DEFENDANT'S FINGERPRINT EXPERT (AT PAGE 543 OF THE TRANSCRIPT (VOL. 11).

"17. THERE WAS NOT SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION OF DEFENDANT (APPELLANT) PURSUANT TO OHIO REVISED CODE SECTION 2911.11 (BREAKING AND ENTERING).

"18. THE COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT AGAINST DEFENDANT (APPELLANT) ON THE BASIS THAT THE INDICTMENT FAILED TO SPECIFY A TIME OF THE ALLEGED INCIDENT WITH ANY PARTICULARITY.

"19. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION IN LIMINE TO RESTRICT THE INTRODUCTION OF FINGERPRINT EVIDENCE OF THE DEFENDANT (APPELLANT)

AND THAT DEFENDANT'S MOTION TO SUPPRESS SUCH EVIDENCE SHOULD HAVE BEEN GRANTED.

"20. THE OHIO REVISED CODE PROVISIONS UNDER WHICH DEFENDANT WAS CHARGED ARE UNCONSTITUTIONAL AND THEREFORE UNENFORCEABLE (AS AGAINST DEFENDANT [sic].

"21. THE COURT ERRED (AT PP. 245-248 OF TRANSCRIPT) WHEN IT PERMITTED THE PROSECUTOR TO ASK THE FOLLOWING QUESTION OF COMPLAINANT.

"22. THE CONVICTION OF DEFENDANT AS TO ALL COUNTS IS NOT PROPER, AND DEFENDANT'S CONVICTION SHOULD BE FOR THE LESSER DEGREE OF EACH OFFENSE.

"23. THE COURT ERRED IN PERMITTING THE PROSECUTION TO ADMIT INTO EVIDENCE THE FINGERPRINT PHOTOGRAPHS OF BOTH AND LATENT AND KNOWN PRINTS (EXHIBITS A, B, C AND D OF THE STATE) AS WELL AS OTHER EVIDENCE OF THE MATCHING OF DEFENDANT'S PRINTS WITH THE KNOWN PRINTS.

"24. IT WAS ERROR TO CONVICT DEFENDANT AS TO THE RAPE CHARGES IN THE SUBJECT CASE AS WELL AS THE BURGLARY CHARGE."

The defendant argues in his first and twenty-fourth assignments of error that the four offenses the defendant is charged with (two counts of rape, one count of attempted rape, and one count of burglary) are offenses of similar import so that the defendant can only be convicted of one offense.

R. C. 2941.25 provides as follows:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

> "(B) Where the defendant's conduct constitutes two or more offenses of similar import, or where his conduct results in two or more offenses of the same or similar kind committed separately, or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

In State v. Logan (1979), 60 Ohio St. 2d 126, 128, the court held "that in order for two crimes to constitute allied offenses of similar import, there must be a recognized similarity between the elements of the crimes committed."

In light of the dissimilarity between the elements of the crimes of burglary and rape, we hold that such crimes are not allied offenses of similar import. Therefore, we find the defendant was properly convicted of burglary as a separate offense from the charges of rape and attempted rape.

Even though a defendant is charged with two or more offenses of the same or similar import, R.C. 2941.25(B) provides that if such defendant possessed a separate animus as to each offense, he may be convicted of all of them. State v. Logan, supra, at 129. In reviewing a trial court's finding that there existed a separate animus for each offense charged,

this court must determine whether there is substantial evidence to support such a finding. Id. at the syllabus. In State v. Barnes (1981), 68 Ohio St. 2d 13, 14, the court held that a forcible act of fellatio followed by forcible vaginal intercourse constituted two separate rape offenses.

In the present case, the defendant attempted anal intercourse and stopped only after the victim told him it was hurting her. The defendant then proceeded to force vaginal intercourse on the victim. Afterwards, the defendant began drinking whiskey and asked the victim to perform oral sex upon him, which the victim talked the defendant out of. The defendant then forced vaginal intercourse with the victim a second time.

We find that there is substantial evidence to support a finding that each of the defendant's acts was a separate and individual offense and each was done with a different and distinct intention on the defendant's part. Therefore, the defendant's first and twenty-fourth assignments of error are found not well-taken.

The defendant in his second assignment of error argues that the trial court erred by refusing the defendant's motion for judgment of acquittal. Specifically, the defendant argues that the state failed to present sufficient evidence showing that he acted "purposely" in committing the offense of rape and attempted rape.

R.C. 2901.22(A) states that "a person acts purposely when it is his specific intention to cause a certain result." Further, in State v. Bridgeman (1978), 55 Ohio St. 2d 261, the syllabus, the court held as follows:

> "Pursuant to Crim. R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

In the present case, the victim testified that the defendant forced vaginal intercourse on her twice, attempted anal intercourse, and asked the victim to perform oral sex upon him. We find that reasonable minds could reach different conclusions as to whether the defendant acted with purpose. Therefore, the defendant's second assignment of

error is found not well-taken.

The defendant's fifth, thirteenth and seventeenth assignments of error each question the adequacy of the evidence as to his conviction. Specifically, the defendant argues his conviction was based solely on circumstantial evidence.

In State v. Barnes (1986), 25 Ohio St. 3d 203, 209, certiorari denied (1987), 480 U.S. 926, the court held that a verdict is not against the manifest weight or sufficiency of the evidence "where substantial evidence is offered by the state in support of all the elements of the offenses charged, and if such evidence was of sufficient probative value to sustain a conviction***." A reviewing court is limited to a determination of whether substantial evidence was adduced at trail "upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." State v. Eley (1978), 56 Ohio St. 2d 169, the syllabus. However, as the Supreme Court of Ohio stated in State v. Kulig (1974, 37 Ohio St. 2d 157, 160, "[I]t is settled that where circumstantial evidence alone is relied

upon to prove an element essential to a finding of guilt, it must be consistent only with the theory of guilt and irreconcilable with any reasonable theory of innocence."

In State v. Brown (1988), 38 Ohio St. 3d 305, 313, certiorari denied (1989), ___U.S. ___, 57 U.S. L.W. 3552, the Supreme Court of Ohio considered both the direct and circumstantial evidence in upholding the defendant's conviction for aggravated murder. In Brown, the defendant's conviction was upheld because of the direct evidence of her fingerprints and circumstantial evidence placing her and her victim as last being seen together constituted "substantial evidence from which the jury could have determined beyond a reasonable doubt" the defendant's guilt. Id. at 313.

In the present case, the victim's uncontradicted testimony is direct evidence that she was raped and her home was burglarized. The only element of the offenses charged that was not established by the victim's testimony was the identity of her assailant. However, the victim further testified that she heard her assailant bump into

and turned over a free standing mirror in her living room prior to leaving her house. The victim further testified she had cleaned the mirror earlier in the evening. Toledo Police Officer Marok lifted and identified the fingerprints as having come from the defendant. The fingerprint testimony constitutes direct evidence linking the defendant to the scene of the crime and refutes the defendant's testimony that he was never inside the victim's house.

Accordingly, we find there was substantial evidence brought forth by the state upon which a jury could reasonably conclude that all elements of the offenses charged were proven beyond a reasonable doubt. Therefore, we find the defendant's fifth, thirteenth, and seventeenth assignments of error not well-taken.

The defendant's third assignment of error is that the trial court refused to grant the defendant's motion to set aside the jury array. The defendant contends that the selection of the jury array did not comport with the requirements of R.C. 2313.16 because potential jurors were improperly excluded from jury service.

R.C. 2313.16 provides, in pertinent part, as follows:

> "When a person liable to serve is excused, in a case specified in this section or when a person notified to attend a term as a jury is entitled to and claims an exemption, the juror can be excused only by the judge presiding at the term which the juror has been notified to attend. Such an excuse shall not extend beyond that term."

However, Crim. R. 24(E) provides, in pertinent part, as follows:

> "No array of petit jurors shall be set aside nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return."

In the present case, the acting jury commissioner clerk testified that approximately twenty potential jurors were excused over the phone by the jury commissioner. These potential jurors were excused for reasons such as being over seventy years of age, attending school or having young children to care for. The jury commissioner further testified that seventy-five jurors were available on the day trial commenced.

We find any alleged impropriety involving

the excuse of potential jurors was insignificant and an insufficient basis to set aside the jury verdict. Accordingly, we find the defendant's third assignment of error not well-taken.

The defendant's fourth assignment of error is that the trial court erred by refusing to grant the defendant's counsel more time to prepare for sentencing. The defendant's counsel contested the defendant's sentencing immediately following the verdict announcement because he was exhausted and unprepared. However, the defendant stated for the record that he wished that the sentencing be held immediately following the verdict.

R. C. 2947.05 states:

> "Before sentencing is pronounced, the defendant must be informed by the court of the verdict of the jury, or the finding of the court, and asked whether he has anything to say to to why judgment should not be pronounced against him."

In the present case, the defendant was afforded the opportunity to speak before sentencing was pronounced and he elected to proceed. Therefore, we find the defendant's right to due process was not violated and his fourth assignment of

error is found not well-taken.

In defendant's sixth assignment of error, defendant argues that the trial court erred by refusing to grant access to victim's statements made to the Toledo Police Department about her attack. Specifically, the defendant questions apparent discrepancies between the victim's description to the police as to her assailant's height and what caused her to believe that the assailant thought she was living alone.

A review of the trial court record reveals that the defendant's counsel was given and reviewed the victim's statements and afforded the opportunity to question the victim about any discrepancies during cross-examinaiton. Accordingly, we find defendant's sixth assignment of error not well-taken.

The defendant in his seventh and eighth assignments of error contest the use of Toledo Police Officers Edward Marok and Keith Snyder by the state as qualified expert witnesses. The defendant argues that the trial court erred in permitting the two officers to testify on

fingerprinting as experts.

In Shackleford v. Cortec, Inc. (1982), 8 Ohio App. 3d 418, 419, the court held:

> "The determination of whether an individual is qualified to give an expert opinion is within the discretion of the trial court and will not be reviewed on appeal unless the trial court clearly abused its discretion."

In the present case, we find the trial court did not abuse its discretion in determining that Officers Marok and Snyder were qualified experts because of the adequate training and length of service spent working on identifying fingerprints by both officers. Officer Marok testified that he had been a Toledo police officer for twenty-two years and been with the Scientific Investigation Unit for fourteen years. He further testified that he presently spends three to five hours of every work day analyzing fingerprints. He received his first training in fingerprint comparison from the Federal Bureau of Investigation in 1975 and has attended additional seminars through the years at the Ohio Peace Officer's Training Academy in London, Ohio. Officer Marok testified that he

has given testimony regarding fingerprint identification in courts of law on over one hundred occasions and has compared and examined "thousands, literally thousands" of fingerprints. Additionally, Officer Marok is a past instructor at Owen Techincal College where he has taught courses in crime scene processing and fingerprint comparison.

Officer Snyder testified that he is a sergeant with the Toledo police department and in charge of the Scientific Investigation Unit. Additionally, he has been a police officer for fourteen years. He testified that his duties include the supervision of all the evidence technicians for the City of Toledo police department. Sergeant Snyder holds an associate's degree of law enforcement and has over one hundred fifty hours toward his bachelor's degree at Bowling Green State University. Additionally, he has had fingerprint training by the Phoenix Police Academy, the Michigan State Police Department, the Ohio Peace Officers' Training Academy, which included two forty-hour instructional courses conducted by the Federal Bureau of Investigation. Additionally, he spent from 1985 until 1988 with the Toledo Police

Scientific Investigation Unit where he conducted fingerprint comparisons which included the development, dusting and lifting of latent fingerprints. Moreover, he is an instructor at the police academy's investigator school, where he teaches courses on fingerprint collection and processing for new investigators.

Accordingly, defendant's seventh and eighth assignments of error are found not well-taken.

In defendant's ninth assignment of error, defendant argues that the in-court identification made by the state's witness, Richard Baker, constituted a violation of his right to due process because such identification was suggestive and not supported by an independent identification.

In State v. Brown, supra, at 310, the court, citing Manson v. Brathwaite (1977), 432 U.S. 98, held that where a witness identifies a suspect during a pretrial procedure, such identification must be suppressed "if the confrontation procedure was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under the totality of the circumstances." However, where there is no

pretrial confrontation procedure, a defendant "cannot claim there was a confrontation procedure that was unnecessarily suggestive." Brown, supra, at 310. Any alleged suggestiveness of such in-court identification "goes to weight and reliability of the testimony rather than admissibility." Id. at 311. Further, "any prejudicial effect of the testimony could have been cured by effective cross-examinaiton." Id.

In the present case, witness Baker was not involved in any pretrial confrontation procedure with the defendant. Therefore, we find the trial court properly admitted Baker's testimony. Accordingly, we find the defendant's ninth assignment of error not well taken.

The defendant in his tenth assignment of error argues that the trial court erred by permitting the state's voir dire examination of the qualification of defendant's expert witness in the presence of the jury prior to such expert's direct testimony. Specifically the defendant argues that the state was permitted to question the expert witness' credibility, rather than his qualifications as an expert witness.

Evid. R. 104(C) states as follows:

> "(C) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall also be conducted out of the hearing of the jury when the interests of justice require."

We hold that a trial court's determination whether to hold a hearing outside the presence of a jury, other than a hearing on the admissibility of confessions, lies within such trial court's discretion. Further, pursuant to Ohio Evid. R. 611, the court has reasonable control over the mode and order used to interrogate witnesses. Such control lies within the discretion of the trial court. State v. Mahoney (1986), 34 Ohio App. 3d 114, 118.

In the case at hand, we do not find that the lower court abused its discretion in permitting the state to ask the defendant's expert witness questions concerning his qualifications, in the presence of the jury, prior to his direct testimony. Therefore, the defendant's tenth assignment of error is found not well-taken.

The defendant in his eleventh assignment of error contends that the trial court erred by overruling defendant's motion to inspect the grand jury minutes.

The Supreme Court of the United States in United States v. Proctor & Gamble Co. (1958), 356 U.S. 677, 683, held that the defendant must show a "particularized need" before the usual shroud of secrecy surrounding grand jury minutes can be lifted by the trial judge. IN State v. Cecos Internatl. Inc. (1988, 38 Ohio St. 3d 120, 124, the court set forth the following standard for determination of a "particularized need" when considering opening grand jury minutes to the defendant's counsel:

> "The standard for a particularized need is met where the defendant's need for the information outweighs the need to maintain the secrecy of the grand jury proceedings."

Further, before an appellate court can disturb a trial court's ruling denying access to the grand jury testimony, there must be a finding of an abuse of discretion. State v. Brown, supra, at 308. An "abuse of discretion" has been defined to mean an attitude by the trial court that is unreasonable, arbitrary or unconscionable. State v. Adams (1980), 62 Ohio St. 2d 151, 157.

In the present case, the alleged discrepancies between the victim's trial testimony and her

grand jury testimony are the same discrepancies between the victim's trial testimony and the victim's statement to police. As we found in the sixth assignment of error, the defendant cross-examined the victim as to these alleged discrepancies.

Therefore, we find, the trial court did not abuse its discretion in overruling the defendant's motion to inspect the grand jury minutes and the defendant's eleventh assignment of error is found not well-taken.

The defendant in his twelfth assignment of error argues that the trial court erred by not ordering separate trials for the burglary and rape charges.

Crim. R. 8(A) provides as follows:

> "Joinder of offenses. Two or more offenses may be changed in the same indictment, information or complaint in a separate court for each offense if the offenses charged, whether felonies or misdemeanor or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts of transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

However, Crim. R. 14 provides in pertinent part, as

follows:

> "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1)(a) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial."

Further, in State v. Torres (1981), 66 Ohio St. 2d 340, the syllabus, the court held as follows:

> "A defendant claiming error in the trial court's refusal to allow separate trials of multiple charges under Crim. R. 14 has the burden of affirmatively showing that his rights were prejudiced; he must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial, and he msut demonstrate that the court abused its discretion in refusing to separate the charges for trial."

Both in his motion to the trial court and in his argument on appeal, the defendant simply asserts that joinder of the burglary and rape

charges was prejudicial. He states no grounds to support this allegation of prejudice nor furnishes any information to demonstrate how his right to a fair trial was compromised.

Upon review of the offenses charged and the record below, we find that the lower court was within its discretion to join the charges in the interest of judicial economy and because no prejudice to the defendant is demonstrated. Therefore, we find the defendant's twelfth assignment of error not well-taken.

The defendant in his fourteenth assignment of error argues the trial court erred by admitting into evidence the victim's medical record and the rape kit. The defendant claims this evidence is hearsay and therefore inadmissible.

Evid. R. 801(C) defines "hearsay" as "a statement other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." Further, Evid. R. 801(A) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is

intended by him as an assertion."

In the present case, there is no indication that the victim's medical record was ever admitted into evidence in the proceedings below. Further, the rape kit, which consists of four envelopes containing materials, hairs and specimens obtained from the victim, constitutes physical evidence. Such physical evidence is not a statement and therefore not subject to the hearsay rule. Accordingly, defendant's fourteenth assignment of error is found not well-taken.

The defendant's fifteenth assignment of error concerns a voir dire examination of the female jurors after the trial had commenced. This voir dire was held to determine whether the assistant prosecutor had conversations with any of the female jurors during one of the trial's recesses. This claim was made by defendant's relatives and friends. It was determined that the assistant prosecutor did not speak with any of the jurors. However, the defendant argues that the entire process appeared to leave a "residual prejudice" to his case, and therefore, a mistrial should have

been granted.

We fail to see how this jury examination would cause any prejudice in the minds of jurors. We, therefore, find the defendant's fifteenth assignment of error not well-taken.

In his sixteenth assignment of error, the defendant argues the trial court erred in limiting the questioning of the defendant's expert witness on redirect examination during voir dire. Defendant's expert had testified that he had received formal training in Hungary approximately thirty-five years ago regarding fingerprint identification. Upon cross-examination, the expert witness admitted he had no certificate in his possession to coorborate his training. Upon redirect examination, the following exchange took place between defense counsel, Attorney George R. Royer, the court and expert witness:

> "Q. You want to explain to the Court and jury the circumstances under which you left Hungary and why you don't have your certificate here in this country?
>
> "A. As I stated up front, I came here under political asylum after the revolution. I was shot three times, and I was sentenced to die, and I didn't feel like dying, so lucki-

ly with other helps, I did escape to Austria.

"Q. How did you go to Austria from Hungary?

"MR. MANDROSS: Your Honor --

"MR. ROYER: Wait a minute. This is important about why he doesn't have his certificate.

"THE COURT: I will sustain the objection as to the circumstances. I think we can ge to the conclusions without going into all the particulars.

"MR. ROYER: Well, I think that --

"THE COURT: I have ruled. Let's go to the ultimate issue.

"MR. ROYER: I want to make a proffer for the record quickly.

"THE COURT: The Court will just rephrase the question itself. Mr. Szigetti, as a result of the manner of fashion of which you left for Austria, was it under such circumstances as you did not bring any personal belongings, including your certificate with you?

"THE WITNESS: That's correct. I couldn't even bring my birth certificate."

The defendant proffered that the expert witness would have testified that in escaping Hungary, he traversed the Danube by swimming alone just after the peak of the 1956 Hungarian Revolution and could not carry any documents with him.

In State v. Sage (1987), 31 Ohio St. 3d 173, paragraph two of the syllabus, the court held that

"[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." Further, such exercise of discretion will not be disturbed by a reviewing court "absent a showing that the accused has suffered material prejudice." Id. at 182.

We fail to see how the refusal to admit the proffered testimony could prejudice the defendant because his expert witness was allowed to justify why he did not have his documentation. Any further explanation of his escape has no legal bearing on the defendant's case. Therefore, we do not find the trial court abused its discretion. Accordingly, we find the defendant's sixteenth assignment of error not well-taken.

The defendant in his eighteenth assignment of error argues that the trial court erred by refusing to dismiss the indictment on the basis that it failed to specify time in which the offenses occurred.

In State v. Sellards (1985), 17 Ohio St. 3d 169, 171, the Supreme Court of Ohio held that the exact time of an offense is not essential to an indictment unless a necessary element of such

offense.

In the present case, the indictment itself set forth that the offenses occurred on September 9, 1988. Further, the state filed a bill of particulars on January 18, 1989, which further specified the time of the incident to be between 11:15 p.m. and 2:30 a.m. on September 9, 1988. We, therefore, find the defendant's eighteenth assignment of error not well-taken.

As his nineteenth assignment of error, the defendant argues that the trial court erred in refusing to suppress the known fingerprints of the defendant to which the unknown latent fingerprints were compared to at trial. The defendant argues that the known fingerprints were obtained as a result of defendant's allegedly illegal arrest on September 19, 1988.

We find this assignment of error not well-taken because the latent fingerprints were matched to known fingerprints of the defendant obtained from a prior, unrelated, January 7, 1983 arrest and not as a result of the defendant's September 19, 1988 arrest.

The defendant's twentieth assignment of error attacks the constitutionality of R.C. 2907.02 (the rape statute) and R.C. 2911.11 (the aggravated burglary statute). It is the contention of the defendant that the above mentioned sections are unconstitutional because of vagueness. The defendant first asserts that the meaning of "sexual conduct" in R.C. 2907.02 is not properly defined and is, therefore, vague.

The Fourteenth Amendment of the United States Constitution and Article I, Section 16 of the Ohio Constitution mandate that criminal statutes comport with certain basic due process considerations. One such requirement is that the legislation may not be unduly vague and specious. Hence, the United States Supreme Court had held "that [a statute] is void for vagueness where it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute *** and *** because it encourages arbitary and erratic convictions." Papachristou v. City of Jacksonville (1972), 405 U.S. 156.

The defendant first asserts that the meaning of

"sexual conduct" in R.C. 2907.02 is not properly defined and is, therefore, vague. "Sexual conduct" is defined by R.C. 2907.01(A) as "vaginal intercourse between a male and female, and anal intercourse *** between persons regardless of sex." We do not find such definition improper or vague.

The defendant also contends that R.C. 2911.11 is also improper and vague, yet he does not further support this argument. Upon review of the language in the statute, we do not find that R.C. 2911.11 is unconstitutionally vague. Therefore, the defendant's twentieth assignment of error is found not well-taken.

The defendant's twenty-first assignment of error contends that the trial court erred by permitting the prosecutor to ask the victim the following question:

> "Q. Now, did the detective ask you whether or not you felt [your assailant] was taller or shorter than you?"

The defendant argues that the question was leading, designed to elicit a hearsay response and that it had a prejudicial effect on his case.

Upon review of the record, we find that the victim did not answer the prosecutor's question.

Further, we fail to see how the prosecutor's question along had any prejudicial effect on the defendant. Therefore, we find the defendant's twenty-first assignment of error not well-taken.

The defendant in his twenty-second assignment of error, argues that the jury verdict did not properly delineate the degree of the offense charges.

Upon review of the jury verdict, we find such verdict clearly indicated the degree of each offense of which the defendant was charged. Accordingly, the defendant's twenty-second assignment of error is found not well-taken.

As his twenty-third assignment of error, the defendant argues that the trial court erred by admitting the state's exhibits. Apparently, the defendant is arguing that the state's exhibits were not properly authenticated or identified.

Evid. R. 901(A) provides as follows:

> "A requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

In St. Paul Fire & Marine Ins. Co. v. Ohio Fast Freight, Inc. (1982), 8 Ohio App. 3d 155, 158,

the court held that the evidentiary requirement of authentication or identification is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

In the present case, the following exhibits were introduced by the state: (1) state Exhibit A, a rape kit identified at trial by Nurse Melodie Brooks who was present at the time of the victim's examination at the Toledo Hospital, (2) state Exhibit B, a latent fingerprint found at the crime scene which was recovered, and identified at trial, by Officer Edward Marok of the Toledo Police Department, (3) state Exhibit C, known fingerprints of the defendant which identity is not contested and (4) state Exhibit D, a photographic enlargement of the known and latent fingerprint identified by Officer Marok.

We find the evidence going to the identification and authentication of the states exhibits was sufficient to support a finding that each exhibit was what the state claimed. Therefore, we find the defendant's twenty-third assignment of error not well-taken.

On consideration whereof, the court finds that the defendant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that the appellant pay the court costs of ths appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

State v. Ray Patton
C.A. No. L-89-041

Peter M. Handwork, P.J. _____ PRESIDING JUDGE

George M. Glasser, J. _____ JUDGE

Melvin L. Resnick, J. _____ JUDGE

ASSIGNMENTS OF ERROR SET FORTH BY APPELLANT
IN LUCAS COUNTY COURT OF APPEALS

"1. IT WAS ERROR TO CONVICT DEFENDANT AS TO BOTH RAPE CHARGES IN THE SUBJECT CASE AS WELL AS THE ATTEMPTED RAPE(CHARGE)(OR THAT THE TRIAL COURT WAS REQUIRED TO HAVE THE PROSECUTION ELECT AS TO WHICH COUNTS SHOULD HAVEBE [sic] BEEN SUMITTED [sic] TO THE JURY.)

"2. THE COURT ERRED IN REFUSING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE AND REWNEWED [sic] AT THE END OF THE DEFENSE CASE (AS TO ALL COUNTS OF THE INDICTMENT).

"3. THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION TO SET ASIDE THE JURY ARRAY ADVANCED AT THE COMMENCEMENT OF TRIAL AND BEFORE EMPANELING OF THE JURY. (ALTERNATELY, THE APPLICABLE JURY PANEL SELECTION PROCESS IS UN LAWFUL AND UNCONSTITUTIONAL).

"4. THE COURT ERRED IN NOT GRANTING MORE TIME TO DEFENDANT TO PREPARE FOR SENTENCING AFTER COMPLETION OF THE TRIAL, AND NOT COMPLY WITH THE REQUIREMENT OF ORC SECTION 2947.05, ET AL.

"5. THERE WAS INSUFFICIENT EVIDENCE BEFORE THE COUPT TO SUSTAIN THE CONVICTION OF THE APPELLANT AS TO THE CONVICTION FOR RAPE 2907.02 AND ATTEMPTED RAPE. (UNDER OHIO REVISED CODE SECTION 2923.02).

"6. THE COURT ERRED IN REFUSING TO GRANT ACCESS TO THE COMPLAINANT'S STATEMENT MADE TO THE TOLEDO POLICE DEPARTMENT ABOUT THE ALLEGED CRIMINAL VIOLATIONS HEREIN, SAID STATEMENT BEING REQUESTED BY DEFENDANT (APPELLANT)AT THE CLOSE OF THE DIRECT TESTIMONY OF COMPLAINANT PURSUANT TO CRIMINAL RULE 16(B0(6). (IT CONSTITUTED FURTHER ERROR NOT TO ADMIT SUCH STATEMENT INTO EVIDENCE.)

"7. THE COURT ERRED IN PERMITTING TOLEDO POLICE OFFICER EDWARD MAROK, TO TESTIFY AS AN EXPERT WITNESS ON FINGERPRINTING AND TESTIFY HEREIN AS TO

SUCH MATTERS IN THIS CASE AND THEREBY RENDER AN OPINION AS TO THE LATENT PRINTS BEING THOSE OF DEFENDNT.

"8. IT CONSTITUTED ERROR TO PERMIT WITNESS SNYDER TO TESTIFY TO OPINION MATTERS (AS SET FORTH AT TRANSCRIPT PP 627-635).

"9. THE COURT ERRED IN PERMITTING WITNESS BAKER (THE BROTHER OF THE ALLEGED VICTIM) TO MAKE AN IN-COURT IDENTIFICATION OF THE DEFENDANT, AS BEING SUGGESTIVE.

"10. THE COURT ERRED IN OVERRULING DEFENDANT'S (APPELLANT'S) MOTION THAT THE VOIR DIRE OF DEFENDANT'S FINGERPRINT EXPERT (MR. SZGETI) TAKE PLACE OUTSIDE THE PRESENCE OF THE JURY.

"11. THE COURT ERRED IN OVERRULING DEFENDANTS MOTION FOR A RIGHT TO INSPECT THE GRANT JURY MINUES [sic] APPLICABLE TO DEFENDANT'S APPLICANT'S) CASE AND SUCH DENIAL CONSTITUTES AN INFRINGEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHT UNDER THE UNITED STATES CONSTITUTION.

"12. THE COURT ERRED IN REFUSING TO SEPARATE FOR TRIAL THE CHARGES OF BURGLARY (2911.12) FROM THE RAPE CHARGES (ORC SECTION 2907.02 AND ORC SECTION 2923.06).

"13. THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE (AS TO THE FINDING BY THE JURY THAT DEFENDANT WAS GUILTY AS TO ALL COUNTS OF THE INDICTMENT.)

"14. THE COURT ERRED IN ADMITTING INTO EVIDENCE PROSECUTION EXHIBIT NUMBER 1-4 (MEDICAL RECORD OF COMPLAINANT) (RAPE KIT)

"15. THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL AFTER STATEMENTS WERE MADE THAT THE PROSECUTION WAS TALKING TO JURORS.

"16. THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT'S COUNSEL TO ASK THE FOLLOWING QUESTION OF

DEFENDANT'S FINGERPRINT EXPERT (AT PAGE 543 OF THE TRANSCRIPT (VOL. 11).

"17. THERE WAS NOT SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION OF DEFENDANT (APPELLANT) PURSUANT TO OHIO REVISED CODE SECTION 2911.11 (BREAKING AND ENTERING.)

"18. THE COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT AGAINST DEFENDANT (APPELLANT) ON THE BASIS THAT THE INDICTMENT FAILED TO SPECIFY A TIME OF THE ALLEGED INCIDENT WITH ANY PARTICULARITY.

"19. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION IN LIMINE TO RESTRICT THE INTRODUCTION OF FINGERPRINT EVIDENCE OF THE DEFENDANT (APPELLANT) AND THAT DEFENDANT'S MOTION TO SUPPRESS SUCH EVIDENCE SHOULD HAVE BEEN GRANTED.

"20. THE OHIO REVISED CODE PROVISIONS UNDER WHICH DEFENDANT WAS CHARGED ARE UNCONSTITUTIONAL AND THEREFORE UNENFORCEABLE (AS AGAINST DEFENDANT [sic].

"21. THE COURT ERRED (AT PP. 245-248 OF TRANSCRIPT) WHEN IT PERMITTED THE PROSECUTOR TO ASK THE FOLLOWING QUESTION OF COMPLAINANT.

"22. THE CONVICTION OF DEFENDANT AS TO ALL COUNTS IS NOT PROPER, AND DEFENDANT'S CONVICTION SHOULD BE FOR THE LESSER DEGREE OF EACH OFFENSE.

"23. THE COURT ERRED IN PERMITTING THE PROSECUTION TO ADMIT INTO EVIDENCE THE FINGERPRINT PHOTOGRAPHS OF BOTH AND LATENT AND KNOWN PRINTS (EXHIBITS A, B, C AND D OF THE STATE) AS WELL AS OTHER EVIDENCE OF THE MATCHING OF DEFENDANT'S PRINTS WITH THE KNOWN PRINTS.

"24. IT WAS ERROR TO CONVICT DEFENDANT AS TO THE RAPE CHARGES IN THE SUBJECT CASE AS WELL AS THE BURGLARY CHARGE."

§ 2941.25 Multiple counts.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

§ 2313.16 Juror may be excused.

Except as provided by section 2313.13 of the Revised Code, the court of common pleas shall not excuse a person, liable to serve as a juror and drawn and notified, unless it is shown to the satisfaction of the judge by either the juror or another person acquainted with the facts, that:

(A) The juror is then necessarily absent from the county, and will not return in time to serve;

(B) The interests of the public, or of the juror, will be materially injured by the juror's attendance;

(C) The juror is physically unable to serve;

(D) The juror's spouse, or a near relative of the juror or the juror's spouse, has recently died or is dangerously ill;

(E) The juror had been called as a juror for trial in a court of record in the county within the same jury year.

When a person liable to serve is excused, in a case specified in this section, or when a person notified to attend a term as a juror is entitled to

and claims an exemption, the juror can be excused only by the judge presiding or a representative of the judge. Such an excuse shall not extend beyond that term. Every approved excuse shall be recorded and filed with the jury commission.

§ 2923.02 Attempt.

(A) No person, purposely or knowlingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of such offense, or of conspiracy to commit such offense, shall be convicted of an attempt to commit the same offense in violation of this seciton.

(D) It is an affirmative defense to a charge under this section that the actor abandoned his effort to commit the offense or otherwise prevented the commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(E) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to com-

mit aggravated murder or murder is a felony of the first degree. An attempt to commit an aggravated felony of the first or second degree is an aggravated felony of the next lesser aggravated degree than the aggravated felony attempted. An attempt to commit an aggravated felony of the third degree is a felony of the fourth degree. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeaner of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An

attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

§ 2907.02 Rape.

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when either of the following apply:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(1)(b) of this seciton purposely compels the victim to submit by force or threat of force, whoever violates division (A)(1)(b)

of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

§ 2313.12 Exemptions of jurors; proof of exemption; certificate of exemption; record. (GC § 11419-14)

The exemptions of jurors shall be such as are prescribed by sections 2313.01 to 2313.46, inclusive, of the Revised Code, and the general statutes of the state. The commissioners of jurors alone shall decide upon their qualifications and exemptions up until the time of notice for service, except as otherwise expressly provided in such sections; but the court may review and decide upon their qualificaitons and exemptions upon a written application and satisfactory legal proof at any time after they are notified and attend. The commissioners, upon request, shall issue to a person entitled to an exemption a certificate of that fact, which shall exempt the person to whom it is granted from jury duty during the time specified therein. Said commissioners shall keep a record of all proceedings before them or in their office, and of all persons exempted and the time and reasons for such exemptions.

§ 2313.17 Excuse presented in open court. (GC § 11419-19)

A person who has been notified to attend as juror and who makes application to be excused as provided by section 2313.16 of the Revised Code, on the ground that he is not qualified, or is exempt, shall present his excuse in open court to the judge. If such person cannot personally attend, he shall send his excuse by a person capable of making the necessary proof in relation to his claim to be excused. A note of the excuse and of the reason therefor shall be made and attested by the court, and shall be transmitted to the commissioners of jurors by the clerk of the court of common pleas, as part of the return made, as prescribed in sections 2313.01 to 2313.46, inclusive of the Revised Code.

§ 2911.12 Burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined in section 2913.01 of the Revised Code, or any felony.

(B) Whoever violates this section is guilty of burglary, an aggravated felony of the second degree.

[§ 2947.05.1] § 2947.051 [Victim impact statement to be considered in imposing sentence.]

(A) In all criminal cases in which a person is convicted of, pleads guilty to and the plea is accepted to, or pleads no contest to and is found guilty of a felony, the court shall, prior to sentencing the offender, order the preparation of a victim impact statement by the department of probation of the county in which the victim of the offense resides, by the court's own regular probation officer, or by a victim assistance program that is operated by the state, any county or municipal corporation, or any other governmental entity if the offender caused, attempted to cause, threatened to cause, or created the risk of physical harm to the victim of the offense. The court shall, in accordance with sections 2929.12 and 2929.14 of the Revised Code, consider the victim impact statement in determining the sentence to be imposed upon the offender.

(B) Each victim impact statement shall identify the victim of the offense, itemize any economic loss

suffered by the victim as a result of the offense, identify any physical injury suffered by the victim as a result of the offense and the seriousness and permanence of the injury, identify any change in the victim's personal welfare or familial relationships as a result of the offense and any psychological impact experienced by the victim or the victim's family as a result of the offense, and contain any other information related to the impact of the offense upon the victim that the court requires.

(C) A victim impact statement shall be kept confidential and is not a public record as defined in section 149.43 of the Revised Code. However, the court may furnish copies of the statement to both the defendant or his counsel and the prosecuting attorney. Any copies of the victim impact statement that are made available to the defendant or his counsel or to the prosecuting attorney shall be returned by the person to whom they were made available to the court immediately following the imposition of sentence upon the defendant.

THE SUPREME COURT OF OHIO

1990 TERM

To wit: December 19, 1990

State of Ohio,
Appellee,

v.

Ray Patton,
Appellant

Case No. 90-1797

E N T R Y

Upon consideration of the motion for leave to appeal from the Court of Appeals for Lucas County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40,00, paid by Lucas, Prendergast, Albright, Gibson & Newman.

(Court of Appeals No. L89041)

/s/

THOMAS J. MOYER
Chief Justice

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appendix was mailed to Dean P. Mandross, Prosecutor's Office, Common Pleas Court of Lucas county, Ohio, Courthouse, Toledo, Ohio 43624 this 27 day of February, 1992.

John C. Rust
Counsel for Petitioner